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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12-03-2007

CORAM

THE HONOURABLE MR.JUSTICE P. JYOTHIMANI

SECOND APPEAL No. 75 of 1995

1. Jeyammal
2. Kamalammal

..Appellants
Defendants 2 and 3

Vs.

1. Alagammal
2. Muthammal

..Respondents
(Plaintiff and 1st
Defendant)

Prayer: Second Appeal filed under Section 100 CPC against the judgment and decree dated 28.11.1994 made in A.S. No. 27 of 1994 on the file of Subordinate Judge , Tiruvannamalai confirming the judgment and decree dated 29.10.1993 made in O.S. No. 560 of 1984 on the file of District Munsif Court, Tiruvannamalai.

For Appellants	::	Mr.T.R. Rajaraman
For 1 st Respondent	::	Mr.V. Raghavachari
R2	::	Not Appearance

J U D G M E N T

The unsuccessful defendants 2 and 3 before the Trial Court are the appellants. The first respondent filed a suit for partition claiming one-third share in respect of the suit property. It is an admitted fact that the plaintiff and defendants 1 and 2 are sisters and the suit property belonged to their father Natesa Nainar. The suit for partition is defended by defendants 2 and 3 on the basis that Natesa Nainar, who is the owner of the property, by a Will executed by him on 15.6.1964, marked as Ex-B1, has bequeathed the entire property in favour of the second defendant. It is also the further case of the second defendant that it was based on that Will executed by her father, she had sold the property to the third defendant under a registered sale deed dated 21.6.1984 marked as Ex-B2. Both the Courts below have found that the plaintiff is entitled for one-third share with a definite



finding that the defence taken by the second defendant that she has got the suit property absolutely from her father under a Will executed by him dated 15.6.1964, marked as Ex-B1, has not been proved and also factually found that the second defendant had only acted on behalf of the plaintiff and the first defendant in collecting rent from the suit property and therefore, there was no question of ouster.

2. It is the contention of the learned counsel for the appellants that the plaintiff and the first defendant were aware of the Will executed by their father on 15.6.1964 and that the plaintiff had waited for more than 20 years for the purpose of filing the suit and from the date of execution of the Will till date, the defendants have been in possession and therefore, the third defendant should be treated as having perfected title by adverse possession in having enjoyed the property for a long period. However, the fact remains that claim of the third defendant herself is based on EX-B2, which was only on 21.6.1984.

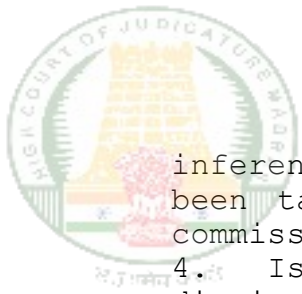
3. On the other hand, the learned counsel appearing for the first respondent/plaintiff would submit that both the Courts below have found that the second defendant, who has claimed exclusive right over the suit property based on the Will of her father Natesa Nainar dated 15.6.1964 has failed to prove the genuineness of the Will and both the Courts found, on facts, that the second defendant had been enjoying the property, for and on behalf of the plaintiff and the first defendant, being sisters and therefore, there is absolutely nothing warranting interference in the second appeal since, there is no question of law involved in this case.

4. At the time of admission of the second appeal, the following substantial questions of law arose for consideration:

" 1. When the first defendant has established the genuineness as well as the execution, attestation of the Will dated and proved the Will in accordance with law, is the learned Subordinate Judge right in holding that the first defendant failed to prove the genuineness of the same?

2. When the first defendant has established her possession by producing the revenue records from 1970 and in view of the fact that the plaintiff asked 2nd defendant having aware of the same did not question it for over a statutory period, is the learned Subordinate Judge right in rejecting the plea of adverse possession?

3. When the first defendant filed an application to examine the scribe as witness by filing a commission petition I.A. No. 643/1993 and the trial court having dismissed it, is the learned Subordinate Judge having not taken note of the same right in drawing an adverse



inference against the appellants as if no step having been taken to examine the scribe atleast by way of a commission?

4. Is the learned Subordinate Judge right in dismissing the application for additional evidence when the appellants produced the records from proper custody?"

5. A reference to the judgments of the Courts below would show that both the Courts have, on evidence, come to the conclusion that the second defendant has not proved the genuineness of the Will Ex-B1 stated to have been executed by Natesa Nainar dated 5.6.1964 in favour of the defendants. In fact, both the Courts have, in detail, dealt with the evidence adduced on behalf of the second defendant in proving the Will, namely, Ex-B1. It is seen that the second defendant as D.W.1 has given contradictory evidence regarding the Will, as found by both the Courts. The Courts below have found that the second defendant, having placed reliance on the Will executed by the father on 15.6.1964, has chosen to execute the sale deed in favour of the third defendant on 21.6.1984, just before the filing of the suit, which was on 21.7.1984. While it is admitted that Natesa Nainar is the owner of the property and the relationship between the plaintiff and defendants 1 and 2, being sisters, is also admitted and when one of the sisters namely, the plaintiff has filed a suit for partition and the second defendant claims exclusive right over the suit property based on the Will of Natesa Nainar dated 15.6.1964, it is incumbent on the second defendant to produce and prove the Will before the Court. As I have stated earlier, the Will produced before the Courts below has not been accepted by both the Courts. The Courts below have noticed that while at one point of time, the second defendant as D.W.1 has stated that one of the attesting witnesses as well as the scribe of Ex-B1 died, subsequently, in the cross-examination, she has admitted that the said scribe is alive. However, no steps have been taken to examine him as a witness to prove the genuineness of the Will. This is relevant because even as per the evidence of the second defendant as D.W.1, she was not aware of the writing of the Will by her father. It is true that substantiating the contention regarding the validity of the Will, she has examined one other attesting witness, by name, Perumal Nainar, as D.W.4. However, as rightly found by the Courts below, the said D.W.4 has given blatantly contradictory statements about the Will itself. He has stated in his evidence, at one point of time, that what was signed by Natesa Nainar under Ex-B1 was on a stamp paper while it remains a fact that EX-B1 Will was not signed on a stamp paper. The Courts below have found that between the end of the Will and the signature of Natesa Nainar, there is a long gap which creates a suspicion. A reference to Ex-B1 also shows that there is more than 1" gap between the signature of Natesa Nainar and the witnesses. In the



circumstances, when the Courts below have found that the evidence of one of the attesting witnesses namely, D.W.4, is not reliable and contradictory and when the second defendant has herself admitted that the scribe of the Will is alive, the failure to examine the said scribe as a witness creates a doubt as regards the genuineness of the Will.

6. One other startling factor is that D.W.4 has admitted that Natesa Nainar, who made him to sign in the Will, has taken him to the Sub- Registrar's Office at Tindivanam Road and that it was registered on the same day, but stated that he was not available at the time of registration. Subsequently, he changed his evidence saying that the said Sub-Registrar's Office was not at Tindivanam Road, but it was at Mathalankulam Street. A reference to the Will further reveals that while one of the attesting witnesses in the Will is stated to be M. Perumal Nainar S/o. Munusamy Nainar, examined as D.W.4, the witness, the person who signed before the Sub-Registrar is stated as S. Perumal Nainar, S/o. Sabapathi. In such circumstances, when Ex-B1 is in an unstamped paper, the evidence of D.W.4 that he signed as a witness on a stamp paper casts a shadow on his evidence, who is the only witness examined for the purpose of proving the Will relied on by the second defendant and it is on the basis of the said factual position, the Courts below rightly came to the conclusion that the defence raised by the second and third defendant is not acceptable. It is seen that when the second defendant has filed a petition for the purpose of examining the scribe before the Trial Court, it was dismissed. However, the second defendant did not take any further steps and in any event, nothing prevented the second defendant from taking out an application for examination of the scribe through a Commissioner, which has not been admittedly done.

7. As far as the defence of ouster is concerned, the second defendant has taken an inconsistent stand as regards ouster as well as the plea of perfection of title by adverse possession. In any event, there is no proof regarding ouster or adverse possession, especially, when the Courts below have come to the conclusion that the Will relied on by the second defendant has not been proved and when, admittedly, Natesa Nainar is the owner of the property, it can be only presumed that the plaintiff and defendants 1 and 2 have been the joint owners and the enjoyment of the property by the second defendant can only be on behalf of the other co-owners. As held by the Division Bench of this Court in the judgment reported in 1985 Law Weekly 596 (Minor Ibramsa Rowther V. Sheik Meerasa Rowther), the possession of a co-owner is presumed to be on behalf of all the co-owners in view of the unity of title and possession. Therefore, it requires something more like exclusive possession. The Division Bench, in the said judgment, has also distinguished between adverse possession as between strangers and ouster at the exclusion of co-owners. The relevant portion of the



judgment is as hereunder:

"In the case of ouster of a co-owner, the position is entirely different. The possession of one co-owner is presumed to be on behalf of all the co-owners in view of the unity of title and possession. Because of this presumption of joint ownership in the case of co-owners, the law requires, to constitute ouster, proof of something more than mere exclusive possession and exclusive receipt of income. Along with exclusive possession there must be an ouster, a hostile, open denial and an open repudiation of the other co-owner's right to the latter's knowledge. The co-owner in exclusive possession cannot render his possession adverse to the other co-owner merely by any secret, hostile animus on his own part in derogation of other co-owner's title."

8. In the above factual circumstances, there are no questions of law much less any substantial question of law that arise for consideration in the second appeal and the same is dismissed. No costs.

Nv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge,
Tiruvannamalai.
2. The District Munsif,
Tiruvannamalai.
3. The Section Officer, VR Section,
High Court, Madras

+ one cc to Mr. T.R. Rajaraman, Advocate sr no. 15245

KLT(CO)
NM(28.03.07)

Second Appeal No.75/1995